

THIS DISPOSITION IS
NOT CITABLE AS PRECEDENT
OF THE TTAB

Mailed: May 14, 2003
Paper No. 25
BAC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

High Sierra Food Services, Inc.

v.

Lake Tahoe Brewing Company, Inc.

Cancellation No. 29,933

Kim J. Mueller of Law Offices of Kim J. Mueller for High
Sierra Food Services, Inc.

Craig M. Stainbrook of Johnson & Stainbrook, LLP for Lake
Tahoe Brewing Company, Inc.

Before Seeherman, Walters and Chapman, Administrative
Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

High Sierra Food Services, Inc. (a California
corporation) has filed a petition to cancel a
registration on the Principal Register issued to Lake
Tahoe Brewing Company, Inc. (a California corporation),
for the mark shown below



for "beer" in International Class 32. Registrant disclaimed the words "LAKE TAHOE BREWING COMPANY."¹

The petition to cancel (filed by petitioner without counsel)² is inartfully written, in that except for a claim that respondent's mark is geographically deceptive under Section 2(a) of the Trademark Act, 15 U.S.C. §1052(a), any other intended grounds for cancellation are unclear; and there are no facts pleaded regarding petitioner's standing.

Nonetheless, we reiterate herein the assertions in the petition to cancel which are as follows:
Respondent's mark "is causing confusion in the market place"; respondent did not disclose in its application that "the sole use of the Mark was on products produced by others (TMEP section 1201.03)"; respondent "made a false statement in its application" when it stated "no

¹ Registration No. 1,948,700, issued January 16, 1996, from an application filed on January 5, 1995; Section 8 affidavit accepted. The claimed date of first use and first use in commerce is August 18, 1993.

other person, firm, corporation or association has the
right to use said mark in

² Petitioner has been represented by counsel since its attorney entered an appearance on petitioner's behalf in a motion to extend trial dates filed November 8, 2000.

commerce..."; the first use in commerce of respondent's mark was by others and was deceptive and did not inure to the benefit of respondent; "when a mark is merely the name of the owner of the Mark[,] the use of the Mark on products not made by the owner is deceptive"; and respondent's use was by others and was illegal under BATF regulations on geographic brand names (7 C.F.R. Section 7.24(h)).

Petitioner then asserts the following:

- The mark is deceptive. Lake Tahoe Brewing Company is not a brewery and has never made beer.
- The Mark is Geographically Deceptive pursuant to [Section] 2(a) of the Trademark Act.

- ✧ The primary significance of the mark is geographic. The words "Lake Tahoe" and a map of the Lake are the dominant features of the Mark.
- ✧ Purchasers think that the products are made in the Lake Tahoe region. There is a goods/place relationship. Goods of ICL 032 are and have been made in the region since 1863; and BATF regulations prohibit geographic misbranding, a fact known to the consumer.
- ✧ The products on which the mark is used and refers do not originate in the Lake Tahoe region.
- ✧ A purchaser's erroneous belief as to Lake Tahoe being [the] origin of the goods materially affects the purchaser's decision to buy Lake Tahoe labeled products because Lake

Tahoe is famous and known for the quality of the water found in the region. And tourists in the region pick a "Lake Tahoe Brewing Company" product over others because of the erroneous belief that it is a local, fresher product, and not made in an industrial area by a large brewery.

In its answer, respondent denies the salient allegations of the petition to cancel, and raises the affirmative defenses of unclean hands (asserting that petitioner did not disclose to the Board that it has a related company which owns application Serial No. 75/307,420 for the mark TAHOE BEER and design); and laches (asserting petitioner had knowledge of respondent's use and registration of its mark since August 1997, and probably earlier, but unreasonably delayed until December 1999 to bring this petition to cancel).

The record consists of the pleadings; the file of respondent's registration; the testimony, with exhibits, of Stephen Charles Downing, petitioner's CEO and secretary (taken by respondent); the testimony declaration of Eric Bledsoe, respondent's CFO and a Director; the rebuttal testimony declaration of Stephen

Cancellation No. 29933

Charles Downing;³ petitioner's notice of reliance filed August 4, 2001; petitioner's supplemental notice of reliance filed May 15, 2002; and respondent's notice of reliance filed August 9, 2002.⁴

³ The testimony and rebuttal testimony declarations were submitted pursuant to the parties' May 15, 2002 written stipulation. See Trademark Rule 2.123(b).

⁴ The parties submitted (also on May 15, 2002) a "stipulation confirming authenticity and dates of documents."

Preliminarily, we address an evidentiary matter. In petitioner's opening brief, footnote 8, petitioner objected under Fed. R. Evid. 701 (opinion testimony by lay witness) to Eric Bledsoe's statement in paragraph 23 of his declaration testimony regarding his "considered opinion" that the Lake Tahoe area is not known for microbreweries or brewpubs. This rule of evidence requires the testimony be "first-hand knowledge or observation" and "be helpful in resolving issues." The most recent amendments to the rule make clear the rule is not intended to distinguish between expert and lay witnesses, but rather between expert and lay testimony. Most courts have permitted the owner or officer of a business to testify on various aspects of the business without qualifying the witness as an expert in various fields, and "such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business." See Advisory Committee Notes 1972 and 2000. In this case, we find the witness's testimony is admissible by virtue of his position in the business. (Moreover, we note that petitioner's CEO and secretary, Stephen Downing, offered

similar testimony, that is, testimony based on his experience in the brewing industry.)

Both parties filed briefs on the case.⁵ Neither party requested an oral hearing.

The next matter to be clarified is that of the issues before the Board in this case. Petitioner recites the issues as follows (brief, p. 6):

- A. Whether the undisputed fact that Respondent did not produce beer in or around Lake Tahoe at the time of applying for and obtaining the LAKE TAHOE BREWING COMPANY registration

⁵ Petitioner filed an "opening brief" on December 5, 2001; subsequently, petitioner's motion to reopen testimony periods was granted by the Board on February 21, 2002. Thus, petitioner's second "opening brief" filed December 27, 2002 is considered petitioner's opening brief, superceding the one previously filed by petitioner.

Respondent's brief was filed on January 13, 2003.

Petitioner filed a "reply brief" on February 10, 2003; and a "corrected" reply brief on February 12, 2003. The "corrected" reply brief is considered petitioner's reply brief, superceding the one previously filed by petitioner.

Petitioner stated in its opening brief (p. 5, footnote 2) that "[its] application file [Serial No. 75/307,420] is automatically part of the record as it is referenced in Respondent's Answer [to the petition to cancel]. (Citations omitted) For convenience, Petitioner provides copies of the excerpts of its application file cited in this brief concurrently herewith." Petitioner is wrong regarding the admissibility of its application file. Trademark Rule 2.122(b)(1) provides that the application or registration which is the subject of the opposition or petition to cancel forms part of the record without any action by the parties. Petitioner's application is not the subject of this cancellation proceeding and the mere mention of it in respondent's answer does not make it of record. Petitioner could have submitted a copy of the application under a notice of reliance pursuant to Trademark Rule 2.122(e), but did not do so. The "Convenience Copies of Excerpts of Petitioner's Application to Register "Tahoe Beer" submitted with petitioner's brief have not been considered.

requires cancellation of the registration on the grounds of geographic deception and geographically deceptive misdescriptiveness?

- B. Whether Respondent provided misleading information in its application to register the LAKE TAHOE BREWING COMPANY mark, to suggest that its beer was produced in or around Lake Tahoe, providing an independent basis for cancellation?

Respondent states the issues are the following
(brief, p. 6):

1. Has Petitioner sustained its burden of proof that Respondents' [sic] mark LAKE TAHOE BREWING COMPANY & Design is geographically deceptive under 15 U.S.C. 1052(a)?
2. Has Petitioner sustained its burden of proof that Respondent provided misleading information in its application to register its LAKE TAHOE BREWING COMPANY mark so as to provide a basis for cancellation?
3. Should Petitioner be barred from canceling Respondent's registration under the equitable doctrine of laches?

Respondent argued in its brief on the case (pp. 15-18) that petitioner did not plead that the mark is geographically deceptively misdescriptive under Section 2(e)(3) of the Trademark Act. Petitioner argued in its reply brief (pp. 6-7) that the petition to cancel gives respondent adequate notice of the claim under Section

2(e)(3) as well as the claim under Section 2(a), but, if necessary, petitioner requests that the pleading be amended to conform to the evidence under Fed. R. Civ. P. 15(b).

It is clear, even giving a liberal construction to the petition to cancel, that the only pleaded ground is that the mark is geographically deceptive under Section 2(a). Although petitioner makes arguments in its brief that the mark is geographically deceptively misdescriptive under Section 2(e)(3), such a claim was not pleaded in the petition to cancel. Respondent argues that it had no notice of such a claim by petitioner. Upon review of this case, we agree with respondent. There is no Section 2(e)(3) claim pleaded. Nor was this ground tried with the express or implied consent of respondent. Because the elements of a Section 2(e)(3) claim are subsumed within a Section 2(a) claim, any evidence submitted by petitioner on these elements would reasonably have been assumed by respondent to refer to the Section 2(a) ground, rather than a separate Section 2(e)(3) ground. Thus, the question of whether the mark is "primarily geographically deceptively misdescriptive" under Section 2(e)(3) is not an issue before the Board.

With regard to the other statements made in the petition to cancel, we clarify that the introductory reference to "causing confusion in the market place" is not a pleading of priority and likelihood of confusion under Section 2(d), and is not so asserted by petitioner.

The allegations regarding not disclosing use on products produced by others and "a false statement" in the declaration in respondent's application is neither pled nor argued as a fraud claim by petitioner. If petitioner had intended to assert a fraud claim (and this was not argued by petitioner), it was not pled with particularity as required by Fed. R. Civ. P. 9(b), and fraud has certainly not been established based on the evidence in this case. "Misleading information," referenced in petitioner's brief (p. 6) is not a ground for cancellation under Section 14 of the Trademark Act. The Board considers both parties' arguments and evidence concerning this asserted "misleading information" to be part of petitioner's claim of deceptiveness under Section 2(a).

Respondent's affirmative defense⁶ of laches must be considered in relation to the pleaded ground. As just explained, the only issue before us is that of

geographical deceptiveness under Section 2(a). The equitable defense of laches is not available against a claim of deceptiveness asserted as a ground for cancellation (or opposition) because it is within the public interest to cancel registrations (or prevent registration of marks) which are deceptive, and this interest or concern cannot be waived by a single person or entity, no matter how long the delay has persisted.⁷ See American Speech-Language-Hearing Association v. National Hearing Aid Society, 224 USPQ 798, footnote 4 (TTAB 1984). See also, Harjo v. Pro Football Inc., 30 USPQ2d 1828, 1831 (TTAB 1994).

Petitioner, High Sierra Food Services, Inc., is located in Truckee, California in the Lake Tahoe region, and petitioner does business under the name Truckee Brewing Company (Downing declaration, paragraph 2). Petitioner engages in, among other things, the operation of the Truckee Brewing Company (Downing dep., p. 9), which makes two beers under the TAHOE BEER brand (one

⁶ Respondent made no mention of its asserted defense of unclean hands in its brief and, thus, the Board considers it waived.

⁷ In this case the maximum delay involved would be from the early 1990s when petitioner first learned of respondent's use of the mark LAKE TAHOE BREWING COMPANY for beer (Downing dep., pp. 17-18) or at least by October 24, 1995 (the date respondent's application was published for opposition -- when petitioner knew or should have known of respondent) to December 6, 1999 (the date petitioner filed the petition to cancel).

Cancellation No. 29933

organic and one pilsner), and the company has applied to register the mark TAHOE BEER (in stylized lettering)(Serial No. 75/307,420) which has been refused registration based on the involved registration. The Truckee Brewing Company first made beer in 1985, and the company first began to use the mark TAHOE BEER around the time its application was filed, i.e., mid-1997. The mark TAHOE BEER was selected by the Truckee Brewing Company in order to connect the history of the area to the beer they made, TAHOE being one of the historic beers of the area (Downing dep., p. 20).

From 1993-1997 Truckee Brewing Company produced about 700-800 barrels of beer annually (40% of that number was bottled beer); but production dropped significantly in 1998.

Truckee Brewing Company contracted to make beer at a different brewery in the late 1980s (before they offered TAHOE BEER).

Mr. Downing averred that as early as 1998 he was aware of at least six breweries in the Tahoe area, including petitioner's, one contract brewery there, and two other breweries in nearby Reno, Nevada. He avers that, based on his experience as a brewer, the "micro/craft brew market" is targeted to purchasers who pay careful attention to where a beer is made. (Paragraph 5). The sale of draft beer obviously does not include labels and the consumer cannot discover the actual origin of the beer if it is different from that indicated by the name of the beer. He also averred that the name "Tahoe" and Lake Tahoe are famous and have marketing appeal based on the characteristics (e.g., "clean," "rugged," "clear," and "not down stream") of the nearby Sierra Nevada mountains and Lake Tahoe itself, and are particularly marketable for a product such as beer which is made mostly of water. Mr. Downing states that in his experience "a consumer is much more likely to purchase a beer he or she believes is made from Lake Tahoe area water, rather than a beer made from the water in one of California's major urban areas, such as that surrounding

San Francisco, which is downstream from agricultural regions and other cities." (Paragraph 9). He avers that for many California consumers, it is common knowledge that the San Francisco area (including the area where respondent's primary contract breweries are located) gets its water from the East Bay Municipal Utility District, not Lake Tahoe; and that, in fact, respondent's contract breweries are located at least 120 miles away from Lake Tahoe.

Eric Bledsoe, respondent's CFO and a Director on the Board of Directors, avers in his testimony declaration that in 1990, he and two friends, Robert Curtis and Everett Charles, began working on recipes for various micro/craft beers, working principally from the home of Everett Charles in Donner Lake, Nevada (about 15 miles from Lake Tahoe, California). Respondent, Lake Tahoe Brewing Company, was formed in June 1991, with initial plans to open a brew pub, and with a complete commitment to developing an enduring relationship to the Lake Tahoe area, by brewing beer in one of the towns in the immediate vicinity of Lake Tahoe. The corporate headquarters are, and have always been, located in Tahoe City, California.

Cancellation No. 29933

In 1992-1993 respondent attempted unsuccessfully to obtain a recently-closed restaurant and next-door gas station in the Lake Tahoe area. [In September 1992 respondent filed an intent-to-use application for the mark LAKE TAHOE BREWING COMPANY (in typed form) for "beer," but this application was abandoned in November 1994 following final refusal as primarily geographically descriptive (Section 2(e)(2) of the Trademark Act).] Respondent's efforts to obtain a brew pub in the Lake Tahoe area continued for several years, with respondent exploring opportunities in Tahoe City, California or nearby (e.g., respondent looked at the Micasa Restaurant site 1996-1997, and Blue Water Brewing sites in the Truckee airport area 1996-1998), and remaining diligent in such search until 1999 when respondent succeeded in securing a suitable site for its brewpub in Stateline, Nevada, on the North Shore of Lake Tahoe.

Respondent has brewed a full range of craft beers on the premises and distributes them to local establishments. Respondent continues to contract for brewing and bottling, but all distribution is (and always has been) handled exclusively from the Tahoe City warehouse. (Declaration, paragraph 24.)

Cancellation No. 29933

In April 1993 respondent began meetings with the Golden Pacific Brewing Company (Golden Pacific) which resulted in a contract for Golden Pacific to produce beer at its Emeryville, California location for respondent, and respondent distributed the beer in the Lake Tahoe region. In May 1993 respondent leased a warehouse two miles outside of Tahoe City, California which has been continuously used to store beer for distribution in the Lake Tahoe and northern California regions. On August 18, 1993 respondent (dba Tahoe Basin Beverage), after being issued a California state license as a beer and wine wholesaler, traveled to Emeryville, California, picked up its beer from Golden Pacific, took the beer to its warehouse, and delivered the goods that night to its first customers.

In September 1993 respondent was featured in a local newspaper ("Sierra Sun") article about local beer makers ("Brewer's Paradise Truckee-North Tahoe is home to a growing number of spirit makers"), wherein the author of the article "treated our beer as a Lake Tahoe product, even though we expressly told her ... that the beer was

brewed by Golden Pacific Brewery in Emeryville."

(Declaration, paragraph 16.)⁸

Mr. Bledsoe also points out the "table tent" specimen filed in respondent's application, which clearly explains on the "Our Story..." side thereof that its beer was first brewed "under a porch at Donner Lake," and that respondent grew and met their "friends at Golden Pacific Brewing Company," and "at [Golden's] facility in Emeryville, we are now brewing the same high quality beer that not long ago was only available under a porch."

In 1994 respondent introduced bottled beers ("Crystal Bay Red Ale" and "Tahoe Red") under the LAKE TAHOE BREWING COMPANY mark. Some of the beers introduced by respondent from 1995-1997 were initially produced by Golden Pacific and by Carmel Brewing Company in Salinas, California. The Carmel Brewing Company contract was terminated in 1998.

When respondent was first organized there were only two brewpubs in the Lake Tahoe area; by 1996 there were three; and from 1996 to 2002 several microbreweries "came and went." Mr. Bledsoe avers "The Lake Tahoe area has never established itself as anything approaching an area

⁸ The article refers to "the Tahoe City-based Lake Tahoe Brewing Co."; and it states in the article "currently brewing at Golden

known for microbreweries and brew/pubs." (Declaration, paragraph 23.)

Respondent's beers have won several national and international major beer tasting competition awards; petitioner's have not. (Declaration, paragraph 26.)

Eric Bledsoe made the following statement in his declaration (paragraph 16):

Throughout our history we have always been entirely above-board in our representations about our brewing arrangements. We develop our concepts, our recipes, our distribution network and clients, and handle most administrative matters from our Tahoe City base; but because of delays in funding and founding the brew pub and microbrewery we wished for, and due to demand that exceeded our ability to produce locally, we initially had to brew our beer "off the hill," that is, somewhere out of the immediately [sic] Lake Tahoe region.

First, we consider the issue of petitioner's standing. Petitioner is involved in making a beer under the brand TAHOE BEER, which is sufficient evidence to establish its standing.⁹

Pacific Brewery in Emeryville, Lake Tahoe Brewing hopes to build its own facility in Tahoe City."

⁹ To the extent that the petition to cancel did not adequately plead facts as to petitioner's standing, we find that the issue of standing was tried by implied consent of respondent. Accordingly, the petition to cancel is considered amended under Fed. R. Civ. P. 15(b) with regard to petitioner's standing.

The only remaining issue before the Board is whether the registered mark (LAKE TAHOE BREWING COMPANY and design) is geographically deceptive of "beer" under Section 2(a) of the Trademark Act.

In the case of *The Institut National Des Appellations D'Origine v. Vintners International Co. Inc.*, 958 F.2d 1574, 22 USPQ2d 1190, 1195 (Fed. Cir. 1992), the Court stated:

A mark may be established as a geographically deceptive mark under §2(a) by showing that it is primarily geographically deceptively misdescriptive under §2(e)(2) [by amendment to the statute--now §2(e)(3)], and additionally showing that the geographic misrepresentation is material to the decision to purchase the goods so marked. (Citations omitted.)

In other words, to prove that a mark is geographically deceptive under Section 2(a), it must be shown that (i) the mark in question consists of or incorporates a term that denotes a geographical location which is neither remote nor obscure; (ii) there is a goods/place association between the goods on which the mark is used and the geographical place named by the term; (iii) the goods do not come from the place named; and (iv) the misdescriptiveness is material to the customer's decision to purchase the goods. In order to

be deceptive there must be evidence of deception which moves purchasers to buy the goods based thereon. That is, the misrepresentation materially affects the decision to purchase the goods. See 2 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §11:58 (4th ed. 2001).

Petitioner bears the burden of proving, by a preponderance of the evidence, its standing and its asserted ground that the registered mark (the words LAKE TAHOE BREWING COMPANY are disclaimed) shown below



is geographically deceptive. See *The Hoover Company v. Royal Appliance Mfg. Co.*, 238 F.3d 1357, 57 USPQ2d 1720 (Fed. Cir. 2001); *Cerveceria Centroamericana, S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307 (Fed. Cir. 1989); and *Cerveceria Modelo S.A. de C.V. v. R.B. Marco & Sons Inc.*, 55 USPQ2d 1298, 1300 (TTAB 2000).

Petitioner's position is essentially that respondent did not produce beer at or near Lake Tahoe at the time respondent applied for and obtained the registration of the mark -- which includes the words Lake Tahoe as well as an aerial view outline design of the lake.

Specifically, petitioner contends that respondent's beer was not produced by respondent "in-house" at Lake Tahoe, but rather it was produced mostly through contract with Golden Pacific in Emeryville, California; and respondent did not obtain a Lake Tahoe locale brew pub until 1999.

In petitioner's nine requests for admissions (unanswered and thus deemed admitted by respondent under Fed. R. Civ. P. 36), respondent admits that its earliest first use of the mark was August 18, 1993; that respondent did not produce beer "in-house" or within 25 miles of Lake Tahoe before January 5, 1995, nor did it do so between January 5, 1995 and January 16, 1996; that the words LAKE TAHOE and the outline map design of the lake were included in the mark because respondent wanted customers to believe the beer sold under that mark came from Lake Tahoe; and that there are many other brewers and producers of beer at and within 50 miles of Lake Tahoe.

Petitioner also submitted, inter alia, a copy of 27 CFR Sections 7.24 and 7.25, which are Bureau of Alcohol, Tobacco and Firearms (BATF) regulations relating to the class and type of malt beverages, and these regulations

include some subparts on geographical names.¹⁰ The parties' stipulation into the record of numerous documents includes copies of paperwork filed by respondent with state (e.g., California, Nevada) and federal agencies (e.g., BATF); correspondence from those agencies to respondent; a copy of a November 1, 1994 contract between respondent and Golden Pacific; a copy of a 1997 letter from Carmel Brewing Co. in Salinas, California to its contract brewers; copies of a few newspaper articles; copies of respondent's labels for its beer; copies of coasters showing respondent's mark; and a copy of respondent's summary of gross sales (1995-1997).

There is no real dispute that Lake Tahoe is the name of a place and that it is known generally to the public, i.e., it is neither remote nor obscure. Thus, the first prong of the test for Section 2(a) geographical deceptiveness is met.

¹⁰ Petitioner submitted copies of (i) BATF regulations "to rebut any inference or presumption that [respondent] uses its mark in an appropriate geographically descriptive manner," and (ii) BATF Certificates of Label Approvals "to rebut any inference or presumption that [respondent] manufactures or is otherwise the source of the goods with which the [involved] mark is used." (Petitioner's notice of reliance, August 4, 2001, exhibits B and C.) Suffice it to say that the Board is not bound by BATF regulations and rulings inasmuch as the Board, in deciding this cancellation, is governed by the Trademark Act and pertinent trademark case law. In any event, the BATF's actions are not necessarily relevant to the issue before us.

Turning then to the second prong of the test, i.e., a goods/place association, petitioner has established that there are several breweries in the Lake Tahoe region and that the region has historically been known for breweries. Respondent acknowledges that there were two brewpubs or microbreweries in the Lake Tahoe area in 1992 when it began developing its business, three by 1996, and several have come and gone since. The evidence shows that there is a goods/place association, and the second prong of the test is met.

The next question is whether the goods come from the place named. As explained thoroughly in the declaration of Eric Bledsoe, respondent's CFO and a Director, respondent does not dispute that from 1993 its beer was made by a contract brewery (mostly Golden Pacific in Emeryville, California), and respondent continues to contract for the brewing and bottling of some of its favored styles (the contract brewery follows respondent's recipe and specifications), and that respondent eventually succeeded in obtaining a brew pub at Lake Tahoe in 1999. However, it is clear that respondent has always had its corporate office in Tahoe City, California (which is very near or at Lake Tahoe); and the goods have always been distributed from the Lake Tahoe area.

Although respondent contracted for the manufacture of its beer at a location over 100 miles from Lake Tahoe, this does not defeat the fact that respondent is located in and at all times has done business in the Lake Tahoe region.¹¹ Thus, we find the goods originate from the place named, the Lake Tahoe area. See *In re John Harvey & Sons Ltd.*, 32 USPQ2d 1451 (TTAB 1994)(HARVEY'S BRISTOL CREAM held not primarily geographically descriptive of bakery goods, namely cakes). Cf. *In re Nantucket Allserve Inc.*, 28 USPQ2d 1144 (TTAB 1993)(NANTUCKET NECTARS held primarily geographically descriptive of soft drinks). Accordingly, the mark is not geographically deceptively misdescriptive, and hence not geographically deceptive.

Moreover, petitioner has failed to establish the fourth element for geographic deceptiveness -- the geographic term is material to consumers in their purchasing decision.

Mr. Downing's averments that "Tahoe" and "Lake Tahoe" have marketing appeal based on characteristics of the nearby Sierra Nevada Mountains and Lake Tahoe (such as "rugged," "clean," "clear" and "not downstream") is not evidence that the water in Lake Tahoe is known to the

¹¹ Of course, since 1999, respondent has brewed beer at its

public for its purity or clarity. Whether or not the relevant public makes an association of beer with Lake Tahoe, there is no evidence that beer is made from the lake water or that beer containing water from the lake (as opposed to, for example, spring water) is a desirable characteristic of beer. The existence of several microbreweries/brew pubs in the Lake Tahoe area over the years establishes a goods/place association of beer with Lake Tahoe, but it is not evidence that purchasers would want to purchase beer from the Lake Tahoe area (e.g., LAKE TAHOE BREWING COMPANY and design brand) based on a belief that it was made with water from Lake Tahoe and/or that such water makes beer of better quality.

On this record, we are not persuaded that the registered mark



is geographically deceptive with regard to respondent's beer. See *In re Sharkey's Drygoods Co.*, 23 USPQ2d 1061 (TTAB 1992). Cf. *Fred Hayman Beverly Hills Inc. v. Jacques Bernier Inc.*, 38 USPQ2d 1691 (TTAB 1996).

Stateline, Nevada (Lake Tahoe region) brew pub.

Decision: The petition to cancel is denied.¹²

¹² Petitioner stated in its reply brief (p. 4) that respondent's specimen of use is improper to show actual use and requested that "Respondent's application [sic-registration] should be remanded to the PTO for re-examination regarding misdescriptiveness." Respondent's involved property is an issued registration, not a pending application. Registrations are not re-examined. Petitioner's request is denied.